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NTSB Order No. EA-4354

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of April, 1995

HERMAN A. REINHOLD, Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	Docket 217-EAJA-NA-2

OPINION AND ORDER

Respondent has appealed from the initial decision of Administrative Law Judge William E. Fowler, Jr., served December 29, 1994, denying applicant's application for $2294.80 in attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.[1] For the reasons discussed below, respondent's appeal is denied, and the initial decision

[1] A copy of the initial decision is attached.

denying EAJA fees is affirmed.

Background

The underlying proceeding from which this EAJA application arose was initiated on November 1, 1993, when applicant filed an "appeal" from what he characterized as an unlawful "indefinite suspension" of his permanent commercial pilot certificate. Applicant had surrendered his permanent pilot certificate to the FAA some five months earlier, pursuant to an emergency order suspending his DC-3 type rating pending a successful re-examination of his qualifications to hold that type rating. On the assumption that applicant would regain his DC-3 rating upon undergoing the re-examination, the Administrator had at that time issued him a temporary commercial pilot certificate (without the DC-3 type rating).[2]

The law judge and the Board upheld the emergency suspension,[3] and applicant pursued an (ultimately unsuccessful)

[2] The Administrator's position throughout this proceeding has been that it is "standard practice" in cases involving suspension of a rating pending re-examination to issue a temporary certificate without the disputed ratings. The Administrator indicated that he would have continued to issue applicant temporary certificates until he either re-qualified for his DC-3 rating (thus entitling him to a return of his original permanent certificate), or "some other action" became appropriate. Presumably, the "other action" could mean issuance of a permanent certificate without the DC-3 rating because applicant failed to re-qualify, or -- as occurred in this case -- issuance of a permanent certificate bearing subsequently-acquired ratings. This practice of issuing temporary certificates pending re-examination -- an apparent attempt to avoid unnecessary paperwork -- does not strike us as unreasonable.

[3] Administrator v. Reinhold, NTSB Order No. EA-3973 (1993).

appeal to the United States Court of Appeals for the Eleventh Circuit. Because the case was still on appeal and applicant had not yet re-qualified for his DC-3 rating when his temporary certificate expired (120 days after its issuance), the Administrator issued him another temporary certificate, with a cover letter dated October 13, 1993. In that letter, the Administrator informed applicant that, if he wished, he could obtain a permanent commercial certificate without the DC-3 rating by submitting an appropriate application. The Administrator warned, however, that such an application "would in effect be a permanent surrender of your DC-3 rating."[4]

It is from this October 13, 1993, letter that applicant "appealed"[5] to the Board. Applicant claimed the letter was an appealable order under section 609 of the Federal Aviation Act

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[4] Despite applicant's claims that there is no authority for this statement, it seems consistent with 14 C.F.R. 61.27, which provides:

> **§ 61.27 Voluntary surrender or exchange of certificate.**
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> The holder of a certificate issued under this part may voluntarily surrender it for cancellation, or for the issue of a certificate of lower grade, or another certificate with specific ratings deleted. If he so requests, he must include the following signed statement or its equivalent:
>
> > This request is made for my own reasons, with full knowledge that my (insert name of certificate or rating, as appropriate) may not be reissued to me unless I again pass the tests prescribed for its issue.

[5] Although the matter was docketed, it was not given the traditional "SE" (signifying "safety enforcement") number. Rather, it was designated "NA"-2, signifying the fact that it was "not accepted" as a proper case for appeal.

[now recodified as 49 U.S.C. 44709],[6] because it allegedly modified his commercial pilot certificate by adding an expiration date. The law judge disagreed, and granted the Administrator's motion to dismiss the case for lack of jurisdiction. Noting that (aside from the suspension of his DC-3 rating, which applicant had appealed in a separate proceeding) applicant's flight privileges were not affected by the issuance of a temporary certificate instead of a permanent certificate, the law judge concluded that the Board lacked jurisdiction under section 609, and dismissed the case.

Applicant appealed from the law judge's dismissal, and both parties filed briefs. But before the Board could rule on applicant's appeal, applicant moved that it be voluntarily dismissed. Applicant stated the matter was moot because the Administrator had issued him a permanent certificate without the DC-3 rating. The Administrator subsequently explained, however, that this permanent certificate was not issued as a result of any change in the Administrator's position in the instant case, but only because applicant had -- in a wholly unrelated circumstance -- earned a new rating (instrument rating).[7] The Administrator asserts that it is standard procedure when a pilot obtains additional ratings to issue a new permanent certificate

[6] Section 609 authorized an appeal to the Board from an "order amending, modifying, suspending, or revoking, in whole or in part, any . . . airman certificate."

[7] The permanent certificate reflects applicant's recently-obtained instrument rating, but (because he had apparently still not undergone the requested re-examination) no DC-3 rating.

reflecting the newly-obtained rating.

In any event, we dismissed applicant's appeal in accordance with his request.[8] Accordingly, the law judge's order dismissing the matter for lack of jurisdiction became final.[9] This EAJA claim followed.

Applicant's EAJA Claim

Applicant sought $2294.80 in attorney fees and expenses pursuant to the EAJA.[10] The law judge denied the application, holding that applicant's EAJA claim was not cognizable under our EAJA rules since it did not arise from an enforcement case under section 609 of the Federal Aviation Act. See 49 C.F.R. 826.3(a).[11] He also noted that, even if applicant's EAJA claim were permitted by our rules, it would nonetheless fail because applicant was not the prevailing party in this proceeding. On this point, the law judge rejected applicant's assertion that the

[8] Administrator v. Reinhold, NTSB Order No. EA-4240 (1994).

[9] Applicant cites Administrator v. Blair, NTSB Order No. EA-4253 (1994) as support for his claim that the law judge's order should not be viewed as a final disposition for EAJA purposes. However, the law judge has aptly summarized why Blair does not stand for such a result in this case, and we adopt his analysis of the issue. (Initial Decision denying EAJA fees, at 3, n. 3.)

[10] The EAJA requires the government to pay to a prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1).

[11] Although our rule contemplates EAJA claims arising from other types of cases as well, applicant has not claimed that this case falls into any of those categories. He has consistently asserted that this is an enforcement action under section 609.

Administrator's issuance of a permanent certificate (apparently in response to an unrelated upgrading of applicant's certificate) was a "vindication" of applicant's position in this proceeding. We agree.

The Administrator's issuance to applicant of a temporary, rather than a permanent, certificate pending his successful re-examination for the DC-3 rating did not constitute an amendment of his pilot certificate. Although the temporary certificate may have appeared different, in that it bore an expiration date, applicant's flight privileges were the same. There is no indication in this record that the expiration date imposed any real limitation on the exercise of applicant's privileges, as the Administrator indicated he was prepared to continue issuing temporary certificates as long as necessary.

The statutory right to appeal from modifications to one's pilot "certificate" can fairly be understood to refer to modifications to the rights and privileges embodied in that certificate, not to changes in the form in which those rights and privileges are documented. As the action applicant complains of involved only a change in the form, and was thus not appealable under section 609 of the Federal Aviation Act, this EAJA claim is not authorized under our rules.

Moreover, even if the claim were cognizable, applicant could not recover under the EAJA because he is not the prevailing party. Applicant has not disputed the Administrator's assertion that the permanent certificate he claims mooted this action was

issued as a result of his unrelated application for an instrument rating. We agree with the law judge that the issuance of the permanent certificate -- although it may co-incidentally have satisfied applicant's unmet demands in this case -- does not represent a "vindication" of his position.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. The initial decision denying applicant's EAJA claim is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.